Testimony of the Michigan Chamber of Commerce
Before the Senate Finance Committee Re SB 82 and SB 83
Tuesday, March 10, 2015

Presented by

Lynn Gandhi, Chair, Chamber Tax Policy Committee

Dear Senators Brandenburg and Robertson and Committee:

My name is Lynn Gandhi and I am a partner in the Honigman law firm, where I specialize in state tax matters. I am a recognized expert in the area of state taxation, I teach state tax at Wayne State University Law School and I write a national column regarding state tax matters.

I appear before you today on behalf of the Michigan Chamber Tax Policy Committee, and on behalf of numerous clients that could be impacted by this issue.

Let me explain. The Department of Treasury is attempting to expand our sales and use tax laws by characterizing certain service transactions as sales of software. We tax very few services in the state. Of the approximately 20 services we tax, such as car rentals, commercial laundry services and providing hotel rooms, there is a specific statute that imposes tax on that service. There is no specific statute to tax services that use software, information services or data hosting services. Nor is there any general statutory provision that would tax these services.

Instead, the Department is attempting to characterize any service, in which the provider of the service uses software to perform the service, as a sale of tangible personal property. The Department is assessing taxpayers on the "use" of this software, even if the service provider has already paid tax on the purchase of the software. This is not a situation where no tax has been paid, rather, the Department is attempting to tax the software twice, by claiming the service provided is taxable.

Michigan businesses are frustrated by the Department's disregard of court opinions and the waste of state resources that are being spent on this issue. I want to clarify that this issue extends to many of the daily activities that we all engage in, whether on our desktop, laptop, tablet, smartphone, or other device. Whether checking your bank account balance, ordering a pizza online or downloading an app, these are all examples of each of us "using" software belonging to a service provider. Michigan job providers, both sellers and purchasers of services are facing a serious issue if left unresolved.

As Tricia and the others have referenced, the transactions that the Department is assessing tax on are service transactions, not sales of tangible personal property. Michigan customers have no control over the software that the Department claims is "virtually delivered" to them and the intent of the customers is to obtain the final result provided by the provider, not the actual software.

The cases previously cited are clear in showing that the courts find no basis in our current statutory language to extend sales or use tax to service transactions. The courts have explicitly indicated that they will not extend our current law to these type of service transactions. It is up to the Legislature to enact a new law to tax these specific services. While the Department may have its own interpretation or "policy" as to its preferred outcome in these instances, it lacks the legal authority to assess tax upon Michigan businesses.

Indeed, a detailed analysis of the Department's positions during the course of litigation would reveal the numerous positions taken by the Department in the course of litigation, some of which are inapposite to, and contradict each other. The courts have found that the intent of these transactions is not to obtain software, but to obtain the services provided by the providers.

I have been authorized by my client [Thomson Reuters (Tax & Accounting) Inc.] to provide the following statement: [see separately written statement].

Moreover, until the Supreme Court grants leave, or decides differently, this case is final as to Thomson. Yet, the Department continues to assess. Just a little over a month ago, a client received an assessment over a million dollars. Think of the burden on that Michigan business. They have begun to increase their headcount in the state as our economy has gradually improved. They face a public referendum that will increase their sales tax on taxable business purchases by over 15%. Now, they must pay over a million dollars simply to have access to the Court of Claims to contest this illegal assessment. How in the world can Michigan businesses feel that the business climate in the state is improving? The state is not entitled to these monies, and continued litigation is not a solution.

Efforts to address the Department's concerns have been for naught. Scenarios speculated on by the Department as so-called "loopholes" have been thoroughly reviewed and found to be inaccurate. The singular comment heard from businesses is the lament of a predictable tax climate in the state.

Cc: Senator Marty Knollenberg
Senator Tom Casperson
Senator John Proos
Senator Steven Bieda
Senator Rebekah Warren

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